

89-1814

Supreme Court, U.S.

FILED

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JOSEPH F. SPANIOL, JR.
CLERK

No. 89-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

GARY ESTEP,

Petitioner,

v.

LIBERTY HOMES, INC.,
PAUL BOLINSKY and ERIE INSURANCE COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

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703-628-9525

Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Do the civil provisions of RICO apply in state court actions for consumer fraud?

2. Did the court err when it refused to apply the civil provisions of RICO when every element required to prove the plaintiff's claim had been deemed admitted as a matter of law?

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LIBERTY HOMES, INC.,
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Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA**

Petitioner prays that a writ of certiorari issue to review the decision of the Supreme Court of Virginia in its case No. 900047, styled *Gary Estep v. Liberty Homes, Inc., Paul Bolinsky and Erie Insurance Company*.

JURISDICTION

This petition is filed pursuant to Rule 21, *et seq.*, of the Rules of the Supreme Court of the United States.

(i) The judgment of which review is sought was entered on March 2, 1990 (Appendix A).

(ii) The jurisdiction of this Court is conferred by 28 U.S.C. §1254(1).

STATUTES INVOLVED

The text of the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §1961, 1962 and 1964 are set forth in Appendix D to this petition.

STATEMENT OF THE CASE FACTS

On April 18, 1987, plaintiff Gary Estep purchased a trailer from defendant Liberty Homes, Incorporated. The plaintiff made full payment in cash at the time of the purchase. Despite receipt of full payment, Liberty Homes, Inc. failed to tender and transfer to the plaintiff title to the mobile home. The plaintiff attempted to obtain the title from Liberty Homes on several occasions. Each time, Liberty Homes would untruthfully represent to Gary Estep that it possessed the title. On more than two occasions, the defendant used the telephone in perpetrating the deception that it could provide title. The defendant, Liberty Homes, had committed similar frauds before by selling trailers to individuals and then not producing title. One such individual, Virginia Thomas, purchased a mobile home for \$20,000 cash and then had to file suit to obtain title. *See Amended Motion for Judgment. (Appendix B).* Suit was filed in state court to recover damages for the defendant's failure to transfer and provide title. *See Amended Motion for Judgment. (Appendix B).* The plaintiff's theory of recovery was based on RICO, breach of warranty and fraud. Before trial on September 20, 1988, default judgment was entered against Liberty Homes, Inc. and Paul Bolinsky because they had failed to answer the motion for judgment. *See order dated September 20, 1988. (Appendix C).*

The plaintiff alleged in its amended motion for judgment that the defendants accomplished their fraud and misrepresentation by a pattern of racketeering activity in which they engaged in two or more instances of wire fraud in violation of 18 U.S.C. §1343. The plaintiff further alleged that the defendants received income derived from that pattern of racketeering activity and invested that income or the proceeds of said income in the operation of an enterprise which is engaged in interstate or foreign commerce. The sufficiency of the pleadings is not at issue. The trial court ruled that the defendants were in default under the amended motion of judgment. (Appendix E). Therefore, every allegation contained in the amended motion for judgment is admitted. Va. Sup. Ct. Rule 1:4(c), 3:17.

Although default judgment was entered against defendants Liberty Homes and Paul Bolinsky, a third party, Erie Insurance Company, was sued under its surety bond. Erie Insurance had answered the motion for judgment and was therefore not in default. The Circuit Court allowed Erie Insurance Company to defend the case on the merits. On December 12, 1988, a jury found that defendants Liberty Homes, Inc. and Paul Bolinsky had intentionally defrauded the plaintiff Gary Estep. Compensatory damages in the amount of \$3,051.40 and punitive damages in the amount of \$15,000 were awarded to the plaintiff. Nevertheless, the Circuit Court struck the evidence on the RICO count, holding that RICO did not apply in this situation. (Appendix F).

REASONS FOR GRANTING THE WRIT

There are four important reasons for granting a writ of certiorari to review the Virginia Supreme Court's decision in this case:

First, the Supreme Court of Virginia has refused to correct the improper dismissal of the RICO cause of action. This appeal involves a pure legal issue because the defendant had been adjudged to be in default. The failure of the Circuit Court to allow the RICO cause of action is contrary to the plain wording of the RICO statute and the interpretations of the statute by this Court. The Supreme Court of Virginia has refused to hear this appeal involving a case of first impression and has thereby allowed the trial court to ignore a federal statute in a situation where it clearly applies.

Second, there are no reported cases in Virginia dealing with the application of RICO. If the Court were to grant this writ, a clear mandate would be established concerning the limits of applicability of the RICO statute in state court proceedings.

Third, this case involves consumer fraud. There is no allegation of an organized crime connection. The case affords the court an opportunity to clearly delineate the outer limits of RICO.

Fourth, the case arises from a state court rather than federal court and therefore gives the Court an opportunity to direct the Supreme Court of Virginia to apply a federal statute where it is clearly applicable.

LAW

Congress enacted the Racketeering Influenced and Corrupt Organizations Act (RICO), Title IX of the

Organized Crime Control Act, to criminalize the infiltration by organized crime into legitimate business. 18 U.S.C. §1961-1968 (1976). In addition to the criminal provisions, RICO creates a civil cause of action for the criminal violations. 18 U.S.C. §1964(c). The civil provisions of RICO transform any party who has been injured by racketeering activity into a potential prosecutor. The possible recovery of treble damages, costs and attorney's fees provide incentive for the injured parties to initiate litigation. *Id.*

RICO prohibits four types of activity by any person: (a) using income derived from a pattern of racketeering activity to acquire an interest in an enterprise, (b) acquiring an interest in an enterprise by means of a pattern of racketeering activity, (c) conducting the affairs of an enterprise through a pattern of racketeering activity, and (d) conspiring to commit any of the above. 18 U.S.C. §1962.

The term "person" includes "any individual or entity capable of holding a legal or beneficial interest in property." 11 U.S.C. §1961(c). The statute defines "racketeering activity" as any of a number of specified predicate offenses, including mail fraud, wire fraud and fraud in the sale of securities. *Id.* at §1961(1). The offenses must be indictable. *Id.* at §1961(b). Any two indictable predicate offenses form a "pattern" as long as the second occurred within ten years after the first. *Id.* at §1961(5). An "enterprise" may be an individual or a group of persons, associated legally or in fact, whose activities affect interstate or foreign commerce. *Id.* §1961(4). The civil provisions allow any plaintiff who alleges having been injured by two or more predicate acts to sue for treble damages.

ARGUMENT

A. PLAINTIFF IS ENTITLED TO RECOVER UNDER RICO.

In order for the plaintiff to recover civil damages under RICO, he must prove: (1) a scheme to defraud and (2) two or more predicate acts in furtherance of the scheme. 18 U.S.C. §1961. The predicate acts may be two or more of any of the acts specified in the statute, in this case, wire fraud. *Id.* Here, the facts are uncontradicted and undisputed because defendant Liberty Homes has been held in default under the plaintiff's amended motion for judgment. The plaintiff alleged that Liberty Homes defrauded him when it sold the mobile home and deceived him as to the availability and existence of the title. The plaintiff additionally alleged that Liberty Homes, in furtherance of its scheme to defraud, committed wire fraud on more than two occasions by calling the plaintiff and representing that the title was in its possession. Tr. p. 18, 21. Moreover, the plaintiff alleged that the defendant received income derived by a pattern of racketeering activity, that the defendant used or invested that income in the operation of an enterprise and that the defendant conducted the affairs of an enterprise through a pattern of racketeering activity. It is settled law that each instance of wire fraud, in this case each telephone call to the plaintiff representing that the defendant had the title and would produce the title to him, constitutes a separate distinct predicate act under RICO. 18 U.S.C. §1961(5). With every allegation having been admitted as a matter of law, defendant Liberty Homes is clearly liable under RICO.

To prove a pattern of racketeering activity, the plaintiff must show at least two predicate acts which

are related and amount to, or threaten the likelihood of, continued criminal activity. *H.J. Inc., et al. v. Northwestern Bell Telephone Company, et al.*, 109 S.Ct. 2893, 57 LW 4591 (1989). Continuity refers to a closed period of repeated conduct or past conduct that, by its nature, projects into the future with a threat of repetition. *Id.* Continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business. *Id.* Here, the admitted facts are that Liberty Homes defrauded plaintiff Gary Estep and that the fraud was furthered by more than two telephone conversations. Further, uncontradicted evidence proved that the defendant had committed similar fraud in the past. Despite ruling that every allegation in the motion for judgment and amendments thereto had been admitted, the Circuit Court refused to enforce RICO. The Supreme Court of Virginia refused to consider this appeal and has unlawfully continued the Circuit Court's refusal. The rulings effectively hold that RICO does not apply as against a legitimate business which has and continues to commit consumer fraud. Although the plaintiff had no burden of proving racketeering activity because it had been deemed admitted, the facts support such a finding. RICO applies where an individual has engaged in past fraudulent conduct that projects into the future with a threat of repetition. This case involves such repetition.

Although it may insult the intuition of attorneys and courts that a statute which was intended to combat organized crime can be used against ordinary businessmen, the sponsors of RICO found it necessary to extend the reach of the statute beyond the confines of organized crime in order to make it effective. *H.J.*

Inc., 109 S. Ct. 2893. It is settled that "Congress wanted to reach both legitimate and illegitimate enterprises." *Id.* As Senator McClellan, one of the sponsors of the legislation, noted, "It is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well." McClellan, *The Organized Crime Act (S. 30) or Its Critics: Which Threatens Civil Liberties?* 46 *Notre Dame Law.* 55, 143 (1970).

Judicial attempts to limit the application of RICO to cases involving racketeers have consistently been rejected. *H.J. Inc.*, 109 S. Ct. 2893; *Note: Civil RICO: The Temptation and Impropriety of Judicial Restrictions*, 95 *Harv.* 1101, 1104 (1982). *See also Schact v. Brown*, 711 F.2d 1343, 1356 (7th Cir. 1983) *cert. denied*, 464 U.S. 1002 (1983); *Bennett v. Berg*, 685 F.2d 1053, 1063 (8th Cir. 1982), *cert denied*, 464 U.S. 1008 (1983). The trial court erred in striking the RICO count on the grounds that the defendant was not engaged in racketeering.

RICO is available for consumer fraud. State courts should be available to individuals who suffer from consumer fraud. Plaintiffs should not be required to go to federal court for every case involving common law fraud just because they have a federal question. Congress has given the benefits of RICO to every citizen in every state. State courts have the authority and the obligation to apply the provisions of RICO.

The issue before the Court is whether RICO applies to consumer fraud. In this case, uncontradicted facts show that the defendant Liberty Homes committed every element that constitutes a RICO offense. If that

weren't enough, a jury found fraud to have been proved on the merits. The Circuit Court, by striking the RICO count where all allegations had been deemed admitted, has in effect disregarded federal statute. The Virginia Supreme Court has likewise disregarded federal statute. The effect of this action must be corrected. Your petitioner seeks this writ to correct the case law of the state of Virginia and establish that state courts, as well as federal courts, must apply the provisions of RICO without artificial and judicial limitations. Not granting the writ will force every plaintiff that suffers common law fraud with the predicate acts to file suit in federal court. Granting the writ would relieve the federal judiciary from trying common law fraud with the predicate acts and yet afford every citizen relief under the provisions of RICO which Congress enacted for their benefit.

CONCLUSION

For the reasons stated herein, a writ of certiorari should be granted to review the decision of the Supreme Court of Virginia.

Respectfully submitted,

DANIEL R. BIEGER

Counsel of Record

E. GAY LEONARD

COPELAND, MOLINARY & BIEGER

212 West Valley Street

Abingdon, Virginia 24210

703-628-9525

Attorneys for Petitioner

APPENDIX



APPENDIX A

OPINION OF THE SUPREME COURT OF VIRGINIA

Virginia:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 2nd day of March, 1990.

Record No. 900047
Circuit Court No. LA423-87

Gary Estep,

Appellant,

against

Liberty Homes, Inc., et al.,

Appellees.

From the Circuit Court of Buchanan County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By: /s/ A. A. ????????

Deputy Clerk

APPENDIX B

VIRGINIA:

IN THE CIRCUIT COURT OF BUCHANAN COUNTY

GARY ESTEP

Plaintiff

v.

LIBERTY HOMES, INCORPORATED

Registered Agent

Jerry D. Farmer

Route 3, Box 110

Abingdon, VA 24210

and

PAUL BOLINSKY

c/o Liberty Homes Incorporated

Route 3, Box 110

Abingdon, VA 24210

ERIE INSURANCE COMPANY

Serve: B. Crawford Banks, R.A.

100 Pelham Drive

Waynesboro, VA 22980

Defendants

AMENDED MOTION FOR JUDGEMENT

Comes now the plaintiff, Gary Estep, by counsel, and moves for judgement against the defendants, Liberty Homes, Incorporated and Paul Bolinsky jointly and severally, on the grounds and amounts as hereinafter set forth.

1. The defendant, Liberty Homes, Incorporated, is a corporation organized under the laws of the State of Virginia, which has designated Jerry D. Farmer as its registered agent in Virginia, and which is engaged in the business of selling mobile homes, which it sells through various agents, including the defendant, Paul Bolinsky. The corporation is

based in Washington County, Virginia and does business in various counties in Southwest Virginia.

2. On April 18, 1987 the plaintiff purchased a used 10' x 55' mobile home from the defendant for \$1,700.00. A copy of the Delivery, Set-Up and Walk-Thru Agreement is attached as Plaintiff's Exhibit "A". A copy of the cancelled check, No. 772, is enclosed as Plaintiff's Exhibit "B".

3. As a result of the purchase of the mobile home, there is either an express or implied warranty of title. Despite the warranty of title, the defendant has not provided the plaintiff with a proper certificate of title to the said mobile home, in breach of said warranty.

4. After purchasing the mobile home, the plaintiff did extensive remodeling of the mobile home and invested approximately \$2,000.00 in it.

5. The plaintiff has made approximately ten trips to the defendant's place of business in Washington County, Virginia to try to obtain the certificate of title, and in doing so missed work and incurred travel expenses. At various times, the plaintiff has had offers to purchase the mobile home from him, but he cannot sell the same because he does not have a copy of the certificate of title with which to transfer good title.

6. As required by §46.1-525.1 of the Code of Virginia, 1950, as amended, Erie Insurance Company has posted a surety bond in the amount of \$15,000.00, bond number V-93-67-70012N on behalf of Liberty Homes, Incorporated as a condition for the issuance of the dealership license to Liberty Homes, Incorporated.

7. And as a result of the fraudulent action of the defendant mobile home dealership, Liberty Homes, Incorporated and its selling agents and owners, Jerry Farmer, the defendant and Erie Insurance Company pursuant to said statute and the conditions of the aforementioned bond are liable to the plaintiff.

COUNT ONE

8. The plaintiff incorporates and realleges all the allegations made in paragraphs 1 through 8.

9. The defendants have jointly and severally breached their warranty of title.

10. Your plaintiff incorporates by reference the allegations contained in Count One and in paragraphs 1 through 5.

11. Your plaintiff alleges that the defendants did intentionally and negligently misrepresent to plaintiff title to the said property.

12. Your plaintiff alleges that he has relied upon such representations.

13. As a direct and proximate result of the misrepresentations, the plaintiff has been damaged as above said.

COUNT THREE

RACKETEERING INFLUENCED AND CORRUPT ORGANIZATION

14. Your plaintiff incorporates by reference the allegations contained in Counts One and Two and in paragraphs 1 through 5.

15. The defendant is a person as defined by 18 U.S.C. §1961(3).

16. The defendant accomplished the fraud and misrepresentations alleged in County Two by a pattern of racketeering activity as defined by 18 U.S.C. §1961(5).

17. The pattern of racketeering activity in which the defendants engaged include two or more instances of wire fraud in violation of 18 U.S.C. §1343.

18. The defendant received income derived from that pattern of racketeering activity alleged in paragraphs 3 and 4.

19. The defendant, in contravention of 18 U.S.C. §1962(a), has used or invested that income or the proceeds of said income in the operation of an enterprise which is engaged in interstate or foreign commerce.

20. The defendant, in contravention of 18 U.S.C. §1962(c) has conducted the affairs of an enterprise engaged in interstate or foreign commerce through a pattern of racketeering activity.

21. Your plaintiff has suffered damages in an amount which exceeds \$5,000.00, and, in accordance with 18 U.S.C. §1964(c) the said damages should be trebled and the plaintiff should be awarded his reasonable attorney's fees and the costs in this action.

WHEREFORE, your plaintiff prays:

1. That he be granted judgment against the defendants, Liberty Homes Incorporated, Jerry Farmer and Erie Insurance Company jointly and severally in the amount of \$5,000.00 for breach of contract and/or misrepresentation and/or fraud.

2. That said damages be trebled in accordance with 18 U.S.C. 1964(c).

3. That plaintiff be awarded his attorney's fees and costs.

4. That plaintiff be granted and such further relief as the court may deem appropriate.

GARY ESTEP
-by counsel-

/s/ Daniel R. Bieger
Daniel R. Bieger, Esq.
COPELAND, MOLINARY & BIEGER
P. O. BOX 1296
Abingdon, VA 24210
(703) 628-9525

EXHIBIT A**DELIVERY, SET-UP AND WALK-THRU AGREEMENT****READ BEFORE SIGNING**

THIS AGREEMENT, made between Liberty Homes, Inc. (to be known as SELLER) and Gary Estep (to be known as PURCHASER), to purchase mobile home serial number AE1050667-5, model number ???, size ???????, with delivery date (if weather permits) of ASAP to the new physical address as follows ????????????????????? Paw Paw, Ky.

It is agreed that the seller will deliver only the above described home.

* * *

It is agreed that if the seller cannot locate the home at the specified place due to mud, sand, trees, bridges, marsh, elevations, etc., it will be the responsibility of the customer to obtain, without cost to the seller, heavy equipment or any other equipment needed to move the home to its location.

It is agreed that it is the customer's responsibility to comply with all local zoning and health regulations.

It is understood that the furnace, appliances, water heater, and air conditioner, if applicable, in the home are under warranty from their respective manufacturers and are under no warranty from the seller except to assist the customer in obtaining service for these items.

It is agreed that any service rendered by the seller after our limited warranty has expired, or any services rendered during the warranty period which are not covered by the warranty will be performed, however, a reasonable charge will be made to the customer for the services rendered. NO VERBAL OR WRITTEN WARRANTIES ON USED HOMES. USED HOMES SOLD "AS IS".

The following changes and/or repairs are mutually agreed upon in writing and NO VERBAL AGREEMENT BY THE SALESPERSON will be honored unless listed on this agreement.

LIVING ROOM: as is

KITCHEN: as is

BEDROOM NO. 1: as is

BEDROOM NO. 2: as is

BATHROOM(S): as is

I/WE the customer(s), have found this home to be acceptable under the above conditions and/or exceptions as noted.

/s/ Gary Estep
Customer


Witness:

/s/ Paul Bolinsky
Salesperson

EXHIBIT B

Adams, Va. - April 18, 1986
 C. 215 - 4107
 RECEIVED FROM Marlene Ester
Seven hundred and two DOLLARS
Payment in full on ARMOR
 ACCOUNT TOTAL \$ 1777.00 # AE1050667-5
 Amount Paid \$ 1777.00
 Balance Due \$ 0.00 - Paul D. Estep
 "THE EFFICIENTEST AND SIMPLEST METHOD"

:K 972

GARY ESTEP 401-82-3081
 3--23-- MARLENE ESTER 401-82-3081 306201113 772
 BOX 267
 HURLEY, VA. 24520 4-18-86 82-113
 Pay to the Order of Liberty Home Dev. \$ 1,700.00
Seven hundred dollars Dollars
 Grundy National Bank
 GRUNDY, VIRGINIA 24514
 For 406.15 H.W.F. # AE1050667-5 Gary Estep
 ⑆05⑆40⑆⑆53⑆ ⑆⑆ 6834 7⑆ 0772 ⑆0000⑆70000⑆

S 7 5 1 0 8 0 7 8

APR 22 1986
 TELLER
 8
 Adams, Va.

FOR ANY BANK - E. G. CREDIT
 CREDIT - 23-28 COU 12 0600
 5 2 7 0 2 0 1 5

VIRGINIA:

IN THE CIRCUIT COURT OF BUCHANAN COUNTY

GARY ESTEP,

Plaintiff

vs.

LIBERTY HOMES, INC.,

Registered Agent:

Jerry D. Farmer

Highway 19, North

Rt. 3, Box 110

Abingdon, VA 24210

and

PAUL BOLINSKY,

c/o Liberty Homes, Inc.

Highway 19, North

Rt. 3, Box 110

Abingdon, VA 24210

and

ERIE INSURANCE COMPANY,

Serve: B. Crawford Banks, R.A.

100 Pelham Drive

Waynesboro, VA 22980

Defendants

AMENDED MOTION FOR JUDGMENT

Now comes the plaintiff and for its amended motion for judgment states as follows:

1. Plaintiff incorporates by reference paragraphs 1 through 13 of his motion for judgment as if pleaded herein.

COUNT THREE

12. Your plaintiff incorporates by reference the allegations contained in paragraphs 1 through 7 and in Counts One and Two.

13. The defendants are persons as defined by 18 U.S.C. §1961(3).

14. The defendants accomplished the fraud and misrepresentations alleged in Count Two by a pattern of racketeering activity as defined by 18 U.S.C. §1961(5). More specifically, the defendants did on two or more occasions communicate with the plaintiff by telephone conversations. In the said telephone conversations the defendants assured the plaintiff that the defendants were in possession of a certificate of title which the plaintiff could come to Abingdon to pick up. On several occasions the plaintiff came to Liberty Homes' office in Abingdon only to be put off by the defendants and told to return at a later date. The representations by the defendants that Liberty Homes had possession of the certificate of title were intentionally made by the defendants, were made by the defendants with knowledge of their falsity and were relied upon by the plaintiff. The said statements furthered the harm inflicted upon the plaintiff by the defendants when the defendants sold a trailer to the plaintiff and accepted full payment even though the defendants knew they could not deliver good title.

15. Each telephone call wherein the defendants assured the plaintiff that they could deliver good title constitutes an act indictable under 18 U.S.C. §1343, wire fraud.

16. The defendants have committed similar fraudulent acts before, more specifically, but not limited to, selling trailers to individuals and then not producing the title. One such individual was Virginia Thomas. Said Virginia Thomas purchased a mobile home from the defendant for approximately \$20,000.00 cash and then had to sue the defendant in Washington County, Virginia for the certificate of title. The defendant used the same or a similar method of operation with Virginia Thomas as with the plaintiff herein.

17. The pattern of racketeering activity in which the defendants engaged consists of two or more instances of wire fraud in violation of 18 U.S.C. §1343.

18. The defendants received income derived from the pattern of racketeering activity alleged herein.

19. The defendants, in contravention of 18 U.S.C. §1962(a), have used or invested that income or the proceeds of said income in the operation of an enterprise which is engaged in interstate or foreign commerce.

20. The defendants, in contravention of 18 U.S.C. §1962(c) have conducted the affairs of an enterprise engaged in interstate or foreign commerce through a pattern of racketeering activity.

21. Your plaintiff has suffered damages in an amount which exceeds \$5,000.00 and in accordance with 18 U.S.C. §1964(c), the said damages should be trebled and the plaintiff should be awarded his reasonable attorney's fees and the costs in this action.

WHEREFORE, your plaintiff prays:

1. that he be granted judgment against the defendant in the amount of \$5,000.00 for breach of contract and/or misrepresentation;

2. that he be awarded punitive damages in the amount of \$15,000.00;

3. that said damages be trebled in accordance with 18 U.S.C. §1964(c);

4. that plaintiff be awarded his attorney's fees and costs; and

5. that plaintiff be granted any such further relief as the court may deem appropriate.

GARY ESTEP
-by counsel-

/s/ Daniel R. Bieger, Esq.
Daniel R. Bieger, Esq.
COPELAND, MOLINARY & BIEGER
P.O. Box 1296
Abingdon, VA 24210
(703)628-9525

CERTIFICATE OF SERVICE

I, Daniel R. Bieger, Esq., do hereby certify that a true and correct copy of the foregoing motion was forwarded this ??? day of October, 1988 to James Humphreys, P.O. Box 2288, Abingdon, VA 24210.

/s/ Daniel R. Bieger
Daniel R. Bieger, Esq.

VIRGINIA:

IN THE CIRCUIT COURT OF BUCHANAN COUNTY

GARY ESTEP

Plaintiff

v.

LIBERTY HOMES, INCORPORATED

Registered Agent:
Jerry D. Farmer
Highway 19 North
Route 3, Box 110
Abingdon, VA 24210

and

PAUL BOLINSKEY
c/o Liberty Homes, Incorporated
Highway 19 North
Route 3, Box 110
Abingdon, VA 24210

Defendants

MOTION FOR JUDGMENT

Comes now the plaintiff, Gary Estep, by counsel, and moves for judgment against the defendants, Liberty Homes, Incorporated and Paul Bolinsky, jointly and severally, on the grounds and amounts as hereinafter set forth.

1. The defendant, Liberty Homes, Incorporated, is a corporation organized under the laws of the State of Virginia, which has designated Jerry D. Farmer as its registered agent in Virginia, and which is engaged in the business of selling mobile homes, which it sells through various agents, including the defendant, Paul Bolinsky. The corporation is based in Washington County, Virginia and does business in various counties in southwest Virginia.

2. On April 18, 1987 the plaintiff purchased a used 10' x 55' mobile home from the defendant for \$1,700.00. A copy of the Delivery, Set-Up and Walk-Thru Agreement is attached as Plaintiff's Exhibit "A". A copy of the cancelled check, No. 772, is enclosed as Plaintiff's Exhibit "B".

3. As a result of the purchase of the mobile home, there is either an express or implied warranty of title. Despite the warranty of title, the defendant has not provided the plaintiff with a proper certificate of title to the said mobile home, in breach of said warranty.

4. After purchasing the mobile home, the plaintiff did extensive remodeling of the mobile home and invested approximately \$2,000.00 in it.

5. The plaintiff has made approximately ten trips to the defendant's place of business in Washington County, Virginia to try to obtain the certificate of title, and in doing so missed work and incurred travel expenses. At various times, the plaintiff has had offers to purchase the mobile home from him, but he cannot sell the same because he does not have a copy of the certificate of title with which to transfer good title.

COUNT ONE

6. The plaintiff incorporates and realleges all the allegations made in paragraphs 1 through 5.

7. The defendants have jointly and severally breached their warranty of title.

COUNT TWO

FRAUD

8. Your plaintiff incorporates by reference the allegations contained in Count One and in paragraphs 1 through 5.

9. Your plaintiff alleges that the defendants did intentionally and negligently misrepresent to plaintiff title to the said property.

10. Your plaintiff alleges that he has relied upon such representations.

11. As a direct and proximate result of the misrepresentations, the plaintiff has been damaged as above said.

COUNT THREE

RACKETEERING INFLUENCED AND CORRUPT ORGANIZATIONS

12. Your plaintiff incorporates by reference the allegations contained in Counts One and Two and in paragraphs 1 through 5.

13. The defendant is a person as defined by 18 U.S.C. §1961(3).

14. The defendant accomplished the fraud and misrepresentations alleged in Count Two by a pattern of racketeering activity as defined by 18 U.S.C. §1961(5).

15. The pattern of racketeering activity in which the defendants engaged include two or more instances of wire fraud in violation of 18 U.S.C. §1343.

16. The defendant received income derived from that pattern of racketeering activity alleged in paragraphs 3 and 4.

17. The defendant, in contravention of 18 U.S.C. §1962(a), has used or invested or invested that income or the proceeds of said income in the operation of an enterprise which is engaged in interstate or foreign commerce.

18. The defendant, in contravention of 18 U.S.C. §1962(c) has conducted the affairs of an enterprise engaged in interstate or foreign commerce through a pattern of racketeering activity.

19. Your plaintiff has suffered damages in an amount which exceeds \$5,000.00, and, in accordance with 18 U.S.C. §1964(c) the said damages should be trebled and the plaintiff should be awarded his reasonable attorney's fees and the costs in this action.

WHEREFORE, your plaintiff prays:

1. That he be granted judgment against the defendant in the amount of \$5,00.00 for breach of contract and/or misrepresentation.

2. That said damages be trebled in accordance with 18 U.S.C. §1964(c).

3. That plaintiff be awarded his attorney's fees and costs.

4. That plaintiff be granted any such further relief as the court may deem appropriate.

GARY ESTEP
-by counsel-

/s/ Daniel R. Bieger
Daniel R. Bieger, Esq.
COPELAND, MOLINARY & BIEGER
P. O. Box 1296
Abingdon, VA 24210
(703) 628-9525

APPENDIX C

VIRGINIA:

IN THE CIRCUIT COURT OF BUCHANAN COUNTY

AT LAW

File No.: 423-87

GARY ESTEP,

Plaintiff,

v.

LIBERTY HOMES, INC.,
PAUL BOLINSKY, and ERIE INSURANCE COMPANY,
Defendants.

ORDER

On September 20, 1988, this case was brought before the court on plaintiff's Motion for Default Judgment against Liberty Homes, Inc. and Paul Bolinsky, and Erie Insurance Company's Motion for Default Judgment on the cross-claims filed herein against Liberty Homes, Inc. and Paul Bolinsky.

It appearing that Liberty Homes, Inc. and Paul Bolinsky have been duly served and have failed to file responsive pleadings to the Motion for Judgment and to the cross-claims filed herein, the court orders the following:

1. A Default Judgment will be entered against Liberty Homes, Inc. and Paul Bolinsky on plaintiff's Motion for Judgment.

2. A Default Judgment will be entered against Liberty Homes Inc. and Paul Bolinsky on Erie Insurance Company's cross-claim.

3. This action will be continued on the docket for trial. Erie Insurance Company will be permitted to defend this action on the merits and as to damages. Liberty Homes, Inc. and Paul Bolinski will be permitted to defend this action on the issue of damages only.

4. The clerk is directed to send attested copies hereof to counsel of record.

REQUESTED:

COPELAND, MOLINARY & BIEGER
P.O. Box 1296
Abingdon, VA 24210

By: /s/ Daniel R. Bieger
DANIEL R. BIEGER
Counsel for Gary Estep

REQUESTED:

PENN, STUART, ESKRIDGE & JONES
P. O. Box 2288
Abingdon, VA 24210

By: /s/ James N. L. Humphreys
JAMES N. L. HUMPHREYS
Counsel for Erie Insurance Company

ENTER this 20th day of September, 1988.

/s/ Nicholas E. Persin
Judge

A Copy
Teste: Russell V. Presley Clerk
Circuit Court of Buchanan
County, Virginia

/s/ Lois McClanahan
Deputy Clerk

APPENDIX D**TEXT OF THE RACKETEER INFLUENCED
AND CORRUPT ORGANIZATION ACT
(18 U.S.C. § 1961, 1962 and 1964)****§ 1961. Definitions**

As used in this chapter [18 USCS §§ 1961 et seq.]—

(1) “racketeering activity” means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotics or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in

contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 [29 USCS § 186] (dealing with restrictions on payments and loans to labor organizations) or section 501(c) [29 USCS § 501(c)] (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [enacted Oct. 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business

of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter [18 USCS §§ 1961 et seq.];

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter [18 USCS §§ 1961 et seq.] or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter [18 USCS §§ 1961 et seq.];

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter [18 USCS §§ 1961 et seq.]. Any department or agency so designated may use in investigations authorized by this chapter [18 USCS §§ 1961 et seq.] either the investigative provisions of this chapter [18 USCS §§ 1961 et seq.] or the investigative power of such department or agency otherwise conferred by law.

(Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 941; Nov. 2, 1978, P. L. 95-575, § 3(c), 92 Stat. 2465.)

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code [18 USCS § 2], to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

(Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 941.)

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter [18 USCS § 1962] by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter [18 USCS § 1962] may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the

United States under this chapter [18 USCS §§ 1961 et seq.] shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(Added Oct. 15, 1970, P. L. 91-452, Title IX, § 901(a), 84 Stat. 943.)

APPENDIX E

EXCERPT FROM TRANSCRIPT OF TRIAL
(DECEMBER 12, 1988)

[5]

* * *

MR. BIEGER: Another matter was, I believe, that on behalf of the plaintiff we would have to make an election of remedies since we have sued basically under contract and under fraud; and we make that election and elect to proceed under fraud.

THE COURT: Okay. Let the record show that the plaintiff is proceeding under a theory of fraud in this case.

MR. BIEGER: One matter that we didn't bring up that I would like to mention is that previously the Court has ruled that Liberty Homes and Paul Bolinskey are in default. After that ruling there was a amendment to the Motion for Judgment, and they have not answered that either. We would move that they also be deemed to be in default under the amendment to the Motions for Judgment, which have been previously filed.

THE COURT: All right, the Court does hold those two defendants in default since the records of the Court reveal that no answer has ever been filed to the Motion for Judgment or to the amended Motion for Judgment within the time frame prescribed by the [6] Rules of Court.

MR. BIEGER: I believe they are all the matters we brought up, Your Honor.

THE COURT: Is there anything else to go on by way of pretrial?

MR. HUMPHREYS: Yes, sir. With regard to an order entered on September, I believe it was September 20th, in which in the third paragraph of that order, Your Honor,

you say this action will be continued on the docket for trial. Erie Insurance Company will be permitted to defend this action on the merits and as to damages. Liberty Homes and Paul Bolinskey will be permitted to defend this action on the issue of damages only.

I would like to clarify that Erie Insurance Company will have the right to use Mr. Farmer's testimony—Mr. Farmer is the president of Liberty Homes—his testimony in defending the question of fraud.

THE COURT: All right. Do you want to put on the record your reply to that in chambers?

* * *

APPENDIX F

EXCERPT FROM TRANSCRIPT OF TRIAL
(DECEMBER 12, 1988)

[54]

* * *

MR. HUMPHREYS: Your Honor, we move to strike the RICO count. There are several reasons for that. One, under Section 1963(a) and (c) of the RICO Act an enterprise is required. We have copies of those sections of the Act for the Court. 1962(a) and (c) both require an enterprise to be involved in order for a cause of action to be stated under the RICO statute. And under Eastern District of Virginia opinion, *Burton vs. Rhineholt* (phonetic), I have cited that case to the Court earlier.

The Eastern District of Virginia held that an enterprise has not been proven if the only participants in the racketeering activity are a corporation and its employees. The only evidence elicited today of any business involved in this activity in the events of this lawsuit are Liberty Homes, Incorporated and its salesman, Paul Bolinskey. So under the authority of *Burton vs. Rhineholt* we ask the Court to hold that there has been no enterprise proven.

There are several other parts of this analysis. Would you like for me to continue through all of those?

[55] THE COURT: Yes. On this motion, I would.

MR. HUMPHREYS: Furthermore, Your Honor, there has been no pattern proven. The only fraudulent activity possibly proven is the misrepresentation of Mr. Bolinskey at the time of the sale. Under the RICO statute a pattern is required, and the pattern has not been shown simply by one act, as to one defendant.

Furthermore, the RICO statute requires a link between the defendant and the activity involved, the racketeering

activity involved. Now as we have raised earlier, under the bond Erie Insurance Company is only liable for damages caused by the loss occasioned by fraud. So the bond, the terms of the bond do not link Erie Insurance Company to the activity involved here.

Furthermore, Erie Insurance Company is not a person, as defined under the RICO statute, and that is 1961(3). 1962 requires that a person engage in the activities. Erie Insurance Company is not a person under 1961(3), because it does not have a legal or beneficial interest in Liberty Homes. 1962 requires that the person involved have an interest in the enterprise; and if Liberty Homes is the enterprise, Erie Insurance Company does not have an interest in [56] the enterprise.

Finally, under the case of *Copeland vs. Smith*, the Fourth Circuit has held that there must be some kind of participation in the enterprise in order for a person to be held liable under RICO. None of the evidence has shown that Erie Insurance Company was a participant in the activities of Mr. Bolinsky or Liberty Homes.

Finally, Your Honor, the case of *In Re: Action Industries* tender offer, the Eastern District of Virginia has held that simply showing an underlying criminal act, that the underlying criminal act is not sufficient to state a cause of action under RICO. In other words, this is not the type of injury that RICO is meant to address. RICO was meant to address wide-ranging fraudulent or criminal type enterprises. The Court has said that where simple fraud has been shown, state tort law is sufficient to address such injuries, and RICO is not designed simply to provide another remedy to someone who can be adequately compensated under state tort law. That is what the *In Re: Action Industries* tender offer holds, and we would contend that since the only thing shown here, assuming that the only thing shown here is a fraud, it is not the kind of fraud that RICO was [57] designed to address.

I have cited all of these cases that I have mentioned to the Court earlier.

THE COURT: All right. Mr. Bieger.

MR. BIEGER: First of all, Your Honor, I think they started by saying that in order to prove a claim for RICO you have to prove, I believe they said separate enterprise.

MR. HUMPHREYS: Yes, sir, that is right.

MR. BIEGER: We have argued this in a letter-brief to the Court. What that does is eliminates the distinction between a case in RICO under 1962(a) and a case in RICO under 1962(c). What Mr. Humphreys says is that you have to have a different person and a different enterprise is true under 1962(c). The Burton case is a RICO case under 1962(c).

If I may, 1962(c) says:

"It shall be unlawful for any person employed by or associated with an enterprise."

The cases have been construed to mean that you have to have a person employed by an enterprise. You have to have two. 1962(a) does not say that, and we have argued this before. 1962(a) says:

"It shall be unlawful for any person who has received any income from a pattern of [58] racketeering activity."

The statute does not say a person employed by an enterprise. 1962(a) only contemplates the wrongdoer corporation engaging in fraud through a pattern of racketeering activities.

That is exactly what the *Haroco vs. American National Bank & Trust Company of Chicago*, found at 747 Federal Reporter Second, 384, which we have already argued and submitted a copy to the Court, said. In that case the bank was sued because they were fraudulently calculating the interest rate. The Court said under 1962(c) you have to

have two entities, so you couldn't make a claim under 1962(c); but they could make a claim under 1962(a), but in this case they abandoned it because you don't need two entities.

We feel that the evidence has proved the case, a RICO case under 1962(a), and that you don't have two entities. You don't have that analysis. You don't even have that consideration under 1962(a).

The next point that they raise, according to my notes, is that we have not proven a pattern of racketeering. A pattern of racketeering is a defined term under 1961, Subsection 5, and the definition is: "A pattern of racketeering activity requires at least two acts of racketeering activity, one of which [59] occurred after the effective date of the Organized Crime Control Act, October 15, 1970; and the last of which occurred within ten years after the commission of the prior act."

The cases are clear that the two predicate acts—that is what they call them, predicate acts—include wire fraud. Wire fraud is fraud using telephones. We have proof, through the testimony of Mr. Estep, of numerous phone calls. I believe he said about eight or ten. Anyway, it is more than two telephone calls; and in these telephone calls, Liberty Homes continued to lie about having the title, and they furthered their scheme to defraud the plaintiff.

We have also introduced telephone records, showing the telephone calls made from the phone of Rita Vanover, which the Court hasn't seen, but that shows more than two telephone calls made to 628-4107, which is the evidence was Liberty Homes' telephone number. That is the pattern of racketeering, and the evidence has proven that.

The next point is Erie is not a person. Again, the Court has ruled that they can't set up Erie as a separate entity or separate whatever in this lawsuit. The suit is against really Liberty and Erie is having [60] to pay on their bond.

Clearly, the term person is a defined term and it means, among other things, corporations. Liberty Homes is the crucial considerations. They are the person that is involved here.

Another point that they raised was that RICO is meant to address wide-ranging activities, not the kind of fraud here. The Haroco case says what RICO is meant to do, and what RICO says and what RICO doesn't say. RICO says that if you defraud somebody and you have two predicate acts that you use in furtherance of the fraud, that is a violation of RICO. I believe that the Haroco case says that all the courts, it seems like, have addressed the RICO statute, and somewhere along the line talked about what RICO was meant to do and what RICO was not meant to do; and some courts have tried to limit the scope of it, and I believe those cases have been overturned.

The Haroco case, which went all the way to the Supreme Court and was decided in 1984, and the Supreme Court decided that—I am seeing if I can find it here—that RICO casts a broad net. And if RICO casts a broad net, that the broadness is not to be construed as an ambiguity. It is to be construed as a completeness, and RICO was meant to catch all [61] types of fraud. And, of course, even if RICO catches more fraud than maybe we would want if we were perfect, we are going to draft the statute broadly because we don't want people escaping through loopholes.

If the Court will bear with me, I probably can put my finger on the language. The Haroco case said that the Courts have thoroughly refuted the contention that the civil provisions of RICO apply only to organized crime. That has been totally rejected.

Here it is on page 390 of the Haroco case. The Court was then, citing the Supreme Court case, *United States vs. Turkette* (phonetic), 452 U.S., 576, and they said the language of the statute and its legislative history indicate that Congress was well aware that it was entering a new

domain of federal involvement through the enactment of this measure. Indeed the very purpose of the Organized Crime Control Act of 1970 was to enable the Federal Government to address a large and seemingly neglected problem.

I am skipping some.

As the hearings and legislative debates revealed, Congress was well aware of the fear that RICO would move large substantive areas formerly [62] totally within the police power of the State into the Federal realm.

It goes on to say, "As we said more recently in response to a similar challenge—about the broadness—but Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which the minions of organized crime might crawl to freedom than to avoid making garden-variety frauds actionable in federal treble-damage proceedings—the price of eliminating all possible loopholes."

This case, the Haroco case, which cites other United States Supreme Courts, refutes that argument that RICO does not apply in cases like this. RICO applies, if you have fraud and if you have the two predicate acts. In this case we have wire fraud, and the evidence supports the claim for RICO under 1962(a).

I believe that addresses all of the questions that they raised. If the Court has any questions to me about the difference between what I perceive to be between 1962(a) and (c), I will be glad to answer any.

THE COURT: I don't have any questions. Mr. Humphreys, do you desire to respond?

[63] MR. HUMPHREYS: Yes, sir, Your Honor. As I pointed out in the letter I wrote to the Court approximately a month ago, the Haroco case is a discussion of enterprise in 1962(a) in the dictum, because no issue of

1962(a) was involved in the case. These were simply passing remarks in the course of the opinion, which went on to decide the case based on 1962(c).

Nevertheless, the Court can read 1962 for itself. It says it shall be unlawful for any person receiving income through racketeering activity to use or invest such income in an enterprise. So the language of 1962 does require an enterprise, and the Fourth Circuit has so held in that *Burton vs. Rhineholt* case. In fact, at the very end of the case the Fourth Circuit rejected the reasoning of the Ninth Circuit in the Haroco case.

Finally, in regard to this pattern question, the only evidence that has been shown is that if there was a fraud and if there were a number of lies, those lies were concerning the same act. Mr. Bieger's position essentially is that if I do a predicate act, such as fail to deliver title, or something of that nature in the course of a purchase, then that is fraud. And then I tell two or three lies about the [64] same thing later, this one act and two or three frauds result in a pattern. So if I commit one fraudulent act and then tell two lies after I tell one lie afterwards, that states a cause of action for RICO. That is not the kind of pattern that the RICO statute was designed to address. It is not designed to address one wrongful act with several lies told about it. It is designed to address the number of wrongful acts, fraud or what-not, in the course of this racketeering activity.

So that is our argument under RICO.

THE COURT: All right. Anything further, Mr. Bieger?

MR. BIEGER: Just two things, Your Honor. One is that the Burton case deals with 1962(c), and I am not arguing against the Burton. The Burton doesn't apply to 1962(a).

Secondly, Mr. Humphreys has stated how I view RICO to be and he says if there is fraud in one lie, then you have RICO. I accept its analogy, but I don't accept that

one. That is not true, because you have to have fraud and two predicate acts. I think the statute is very plain. It says if you have fraud and you have two lies and the [65] two lies are through the telephone and the lies are in furtherance of the fraud, then you do have RICO. That is exactly what the statute says. That is what the cases have held, and that is how the statute has been construed.

Here we have fraud on the plaintiff, and then we have at least two predicate acts. We have two instances of wire fraud, where they told him that, yes, we have title. Come and get it, which further defrauds. Clearly, this is well within the scope of the RICO statute, and we would ask the Court to deny their motion.

THE COURT: All right. Anything further, Mr. Humphreys?

MR. HUMPHREYS: No, sir.

THE COURT: Mr. Bieger, I am going to grant the motion to strike on the RICO count. I am not convinced from the evidence that RICO applies in this case. I accept the dictum in the case as to 1962(a), the Act, even though that was not an issue in the case. But even using that very broad interpretation that the Court did in the Haroco case, I do not believe that the evidence that has been offered by the plaintiff in this case deals with the RICO count, and I specifically think that the [66] point raised by Mr. Humphreys involving a pattern of racketeering is appropriate.

The fraud, if the jury were to believe that there were frauds committed now based on the quality of the plaintiff's evidence, I don't see anything that was done in furtherance of the fraud. All you have shown is that the plaintiff attempted to make several telephone calls back regarding the title to the trailer, and the same statements were made to him that were made initially. The fraud had already

been completed, if the jury were to find that there was in fact a fraud.

Your third point is well taken, and I am ruling on all of them from the evidence, because the Court does not see that it need be concerned with whether Erie is not a person. Erie doesn't have anything to do with this RICO count because they were in the shoes of Liberty under the bond, and the question is is the employee and the corporation, as was argued under point one, enough to bring it into RICO. I think it is, but I am going to strike it on a fairly showing pattern of racketeering.

I am going to call the jury in and we are going to break for lunch at this time.

* * *